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[¶ 3] STATEMENT OF THE ISSUES

[¶ 4] Whether the Appellant's Constitutional Right to a Speedy Trial was violated?

[¶ 5] Whether the Appellant's Constitutional Right to Remain Silent was unreasonably used against him?

[¶ 6] STATEMENT OF THE CASE

[¶ 7] The Appellant, Joey Michael Wayland, (hereinafter "Wayland") was originally charged with Theft of Property in violation of N.D.C.C. § 12.1-23-02 and Possession of Drug Paraphernalia in violation of N.D.C.C. § 19-03.4-03 on November 6, 2018. A.A. at 4. At that time, Mr. Wayland's bond was set, and he remained in pre-custody for the duration of the case. A.A. at 4-9. After a contested Preliminary Hearing on December 6, 2018, Mr. Wayland was bound over for Arraignment, to which he entered not guilty pleas. A.A. at 3.

[¶ 8] Three days later, through counsel, Mr. Wayland demanded a Speedy Trial pursuant to the U.S. Const. Amend. VI; N.D. Const. art. I, § 12; N.D.C.C. § 29-01-06; and N.D.C.C. § 29-19-02. A.A. at 12. Following the demand for a Speedy Trial, Mr. Wayland made ten (10) separate appearances over the following seven (7) months. A.A. at 5-8. The district court never issued an order on the Speedy Trial issue, despite it being raised over twenty (20) times in the ten (10) appearances. (See Tr. 1/2/19 – 4:6-7, 5:19, 10:23-24, 11:18-19; Tr. 1/29/19 – 4:4-5, 5:16-17, 6:8-9; Tr. 2/26/19 – 4:8-9, 5:2-3, 6:7-9; Tr. 3/21/19 – 5:1-2, 8:1-2, 9:17-18; Tr. 3/26/19 – 2:24, 4:23, 6:12-13; Tr. 4/23/19 – 3:4, 4:13-24; 7/23/19 – 18:19-20; Tr. 7/26/19 – 36:14-15, 56:2-5.)

[¶ 9] At one point the district court did direct the State “to have something in the file with regard to [Mr. Wayland’s] request for a speedy trial...so that the court can rule on that motion as far as the speedy trial.” Tr. 4/23/19 – 4:22-24. Yet, the State did not file anything, and the district court never issued an order or ruling on the subject with any specificity.

[¶ 10] In the midst of the multiple appearances, Mr. Wayland’s counsel motioned for a mental health evaluation, over Mr. Wayland’s objections. A.A. at 20 & Tr. 1/29/2019 – 4:8-9; 5:20-21. The evaluation report was returned to the district court on February 6, 2019. A.A. at 25.

[¶ 11] Ultimately, Mr. Wayland proceeded to trial pro se on July 30, 2019 and was found guilty on July 31, 2019. A.A. at 57. Mr. Wayland was then sentenced on August 22, 2019 to five (5) years with two (2) years suspended, thereby ordered to the Department of Corrections and Rehabilitation for a period of three (3) years. A.A. at 58. Mr. Wayland now appeals the Criminal Judgment.

[¶ 12] Mr. Wayland timely filed a notice of appeal on September 6, 2019, pursuant to N.D.R.App.P. 4. A.A. at 60. The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-28-06 and N.D. Const. art. VI, § 2.

[¶ 13] STATEMENT OF THE FACTS

[¶ 14] The underlying facts of the charges are irrelevant to this appeal, as the appeal asserts violations of Mr. Wayland's Constitutional Speedy Trial and Right to Remain Silent. However, the Appellant's Appendix does include the Affidavit of Probable Cause for easy reference should This Court wish to review the underlying charges. See A.A. at 10.

[¶ 15] To understand the Speedy Trial violation argument of this case it is critical to understand the timeline of events leading to trial, after the demand for a speedy trial was invoked:

- a. **12/09/2018** – Request for Speedy Trial demanded - A.A. at 12.
- b. **12/11/2018** – *Affidavit of 1st Defense Counsel to Withdraw - A.A. at 13.*
- c. **01/02/2019** – Court hearing ruling on motion to withdraw (granted).
- d. **01/11/2019** – New counsel motions court for psychiatric evaluation of Mr. Wayland - A.A. at 20.
- e. **01/29/2019** – Court hearing on eval motion (granted over Mr. Wayland's objection)
- f. **02/06/2019** – Eval conducted – Mr. Wayland declined to participate - A.A. at 25.
- g. **02/26/2019** – Final pretrial conference, court lays out priority list for March 11, 2019 trial week.
- h. **03/07/2019** – District court issues amended scheduling order – continuing Mr. Wayland's trial - A.A. at 27.
- i. **03/28/2019** – *Affidavit of 2nd Defense Counsel to Withdraw - A.A. at 31.*
- j. **03/29/2019** – State's Motion to Continue - A.A. at 35.
- k. **04/01/2019** – Order granting State's Motion to Continue - A.A. at 37.
- l. **04/23/2019** – Court hearing ruling on motion to withdraw (granted).
- m. **07/17/2019** – *Affidavit of 3rd Defense Counsel to Withdraw – A.A. at 41.*
- n. **07/26/2019** – Court hearing ruling on motion to withdraw (granted).
- o. **07/26/2019** – Court order's Mr. Wayland to proceed to trial *pro se*.

[¶ 16] A review of the Register of Actions shows this case was set for trial on March 11, 2019, April 8, 2019, May 6, 2019, and then finally July 30, 2019. Of note, is the original trial date of March 11, 2019, the second defense counsel had not yet motioned to withdraw. Moreover, the second defense counsel appeared with Mr. Wayland at the

February 26, 2019 Final Pretrial Conference indicating there was no deal and the case would proceed to trial.

[¶ 17] At this February 26, 2019 Final Pretrial Conference, the district court outlined the “in-general [priority] list.” Tr. 2/26/2019 – 8:9-11. Even though the details of the specific cases in the priority list are not contained in the underlying record of the case at bar, This Court can take Judicial Notice of the public record aspects of the cases outlined by the district court. The outline of the priority list is as follows, in order, per the district court:

- 1) **Panasuk** – 53-2018-CR-00529 – No Speedy Trial Request; tried on March 12, verdict issued March 13;
- 2) **Robles** – 53-2018-CR-01007 – No Speedy Trial Request; not tried – unknown reasons;
- 3) **Muse** – 53-2018-CR-01131 – No Speedy Trial Request; bench warrant issued on February 26, 2019 for failure to appear at Final Pretrial Conference;
- 4) **Amundson** – 53-2018-CR-01135 – No Speedy Trial Request; not tried, continued by district court on March 8, 2019;
- 5) **Soiseth** – 53-2018-CR-01641 – No Speedy Trial Request; continued by district court on March 8, 2019;
- 6) **Norpel** – 53-2018-CR-01660 – No Speedy Trial Request; continued by district court on March 8, 2019;
- 7) **Wayland** – 53-2018-CR-01643 – Speedy Trial Request filed timely; continued by district court on March 8, 2019;
- 8) **Marcel** – 53-2018-CR-01644 – No Speedy Trial Request; rescheduled on February 27, 2019 for a Change of Plea.

[¶ 18] By the district court’s own words, the priority list was set based on the age of the case, only. Tr. 2/26/2019 – 6:6-9. Of the eight cases that were set for trial on March 11, 2019, seven did not have a speedy trial request, yet six of the cases were set on a higher priority than Mr. Wayland, despite his Speedy Trial request. One of the higher priority cases even had a defendant who failed to appear for court that day and had a bench warrant issued for her arrest. (See 53-2018-CR-01131, State v. Muse.)

[¶ 19] ARGUMENT

[¶ 20] “A defendant in a criminal proceeding has the right to a speedy trial under N.D. Const. art. I, § 12, and the Sixth Amendment to the United States Constitution.” State v. Hamre, 2019 ND 86, ¶ 10, 924 N.W.2d 776. This Court has outlined the Standard of Review in questions involving one’s Speedy Trial rights to be that of *de novo* of the district court’s decision, and clearly erroneous, regarding the district court’s findings. Id. Citing Koenig v. State, 2018 ND 59, ¶ 12, 907 N.W.2d 344; State v. Hall, 2017 ND 124, ¶ 12, 894 N.W.2d 836; State v. Moran, 2006 ND 62, ¶ 8, 711 N.W.2d 915.

[¶ 21] Since 1976, This Court adopted a four-part balancing test from the United States Supreme Court’s decision in Barker v. Wingo, 407 U.S. 514, 530 (1972), regarding speedy trial claims. State v. Erickson, 241 N.W.2d 854, 859 (N.D. 1976). The Barker factors are: (1) the length of the delay; (2) the reason for the delay; (3) the accused’s assertion of the right to a speedy trial; and (4) the prejudice to the accused. See Koenig, 2018 ND 59, at ¶ 20, 907 N.W.2d 344; Moran, 2006 ND 62, at ¶ 8, 711 N.W.2d 915. It is important to note the United States Supreme Court’s rationale in the balancing test, and thereby, This Court’s adoption of that rationale:

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused’s interest in a speedy trial is specifically affirmed in the Constitution.

Barker, 407 U.S. at 503.

[¶ 22] We then must conduct an analysis into the four factors individually, as they apply to the specific case in order to ascertain if the accused’s speedy trial rights were specifically violated.

[¶ 23] **Length Of Delay**

[¶ 24] Admittedly, This Court has ruled that a delay of a year or more is “presumptively prejudicial,” and this case does not have such a “presumptive” prejudicial nature. Moran, 2006 ND 62, at ¶ 9, 711 N.W.2d 915. The length of the delay is however considered a “triggering factor” for the complete analysis. Id. citing Doggett v. United States, 505 U.S. 647, 651-52 (1992). Key use of the word “a” triggering factor is important in the full analysis, combined with the Barker, Court’s assertion that no one factor is more important than any other. 407 U.S. at 503.

[¶ 25] The key factor in the present case is the delay that occurred on the originally scheduled trial date, the week of March 11, 2019. Mr. Wayland was ready for trial, counsel had been appointed for over two months at that point. However, the delay occurs which causes a chain reaction of attorney-client relationship breakdowns, State’s Attorney reassignments, and unavailability of State witnesses.

[¶ 26] As a result, this case is delayed 141 days, from March 11, 2019 to July 30, 2019. Although this delay is below the “presumptively prejudicial” timeframe, it is in combination with “related factors...considered together with such other circumstances as may be relevant.” Id.

[¶ 27] **Reason For Delay**

[¶ 28] Herein lies a fundamental and critical error of the district court. No other reason for the delay from the March 11, 2019 date was articulated by the district court than

“age of the case” and priority lists. As outlined above, the district court made no distinction between Mr. Wayland’s case and the other seven cases set for trial on March 11, 2019. The district court even went so far as to find a defendant who failed to appear for the pretrial conference as a higher priority than Mr. Wayland.

[¶ 29] Thus, the only “reason” that can be articulated for the delay is that older cases took higher priority than Mr. Wayland’s case. This notion of “oldest goes first” above any other factor runs in stark contradiction to the notion of the speedy trial analysis and statutory construction. The Court in Barker, articulated that a defendant must actually “assert” the right to a speedy trial, which became the third factor of the analysis. 407 U.S. at 531. In fact, failing to assert the right weighs against the accused. Id. Moreover, N.D.C.C. § 29-19-02 takes “asserting” the right to another level by invoking a particular timeline to such an assertion. That timeline is “shall elect this right within fourteen days following the arraignment.” N.D.C.C. § 29-19-02. As explained above, Mr. Wayland asserted his right to a speedy trial three days after his arraignment.

[¶ 30] The mere creation of these “prerequisites” to a speedy trial leaves no question that once an accused has complied with these “prerequisites” his/her case must now receive special scrutiny in scheduling. Yet, in the case at bar, Mr. Wayland complied with the prerequisites, yet his case received no special scrutiny when deciding the trial schedule. Mr. Wayland’s case was on even scheduling ground as seven other cases that did not assert a speedy trial right, making his assertion pointless.

[¶ 31] Under the “reason” factor, the accused’s actions usually become the quintessential issue that unhinges the speedy trial right. The State is likely to assert a number of actions by Mr. Wayland that “caused” the delay. First and foremost is Mr.

Wayland's repetitive issues with his counsel. However, as outlined above, it is critical to understand the timeline of the case, to understand why that argument fails.

[¶ 32] At the time of the initial delay, Mr. Wayland had an attorney, that attorney had not yet motioned to withdraw. In fact, that attorney's motion to withdraw did not come until nineteen days after the case *should* have gone to trial. A.A. at 31. The continuance that occurred on March 8, 2019, due to the priority list of the Court, started a chain reaction of issues which resulted in the multiple continuances thereafter.

[¶ 33] The other significant issue that is anticipated to be raised by the State is Mr. Wayland's lack of cooperation in the mental health evaluation at the state hospital. A.A. at 25. As noted above, Mr. Wayland was unquestionably clear that he did not agree to an evaluation and would not cooperate with one. See Tr. 1/29/2019 – 3:13-15, 17; 4:8-9; 5:20-21.

[¶ 34] Herein lies another questionably Constitutionally violative practice. As is noted in the Competency/Criminal Responsibility Evaluation from the State Hospital, "that the report from the evaluation itself would not be confidential" Mr. Wayland was presented with a "Sophie's choice." Either Mr. Wayland cooperates with the evaluation and everything he shares about the alleged crime, his knowledge, his capacity, etc. will be shared with the prosecution; or, Mr. Wayland maintains his Constitutional Right to Remain Silent, and it will be used against him as "uncooperative" and a "reason" in and of itself for the delay of his trial.

[¶ 35] However, the attempted evaluation and report was completed twenty days before the final pretrial conference and over a month before the originally scheduled trial. Any lack of cooperation on Mr. Wayland's part had zero impact on whether the trial was

able to proceed as scheduled. Therefore, the “reason” for the initial delay rests solely on the district court and the State.

[¶ 36] Accused’s Assertion Of The Right To Speedy Trial

[¶ 37] As previously noted, Mr. Wayland made his assertion of his speedy trial right unequivocally clear, in writing on December 9, 2019, and in court on the record, twenty times, in ten appearance, over seven months. Ibid. ¶ 8.

[¶ 38] Moreover, the district court’s complete failure to address the recurring issue of Mr. Wayland’s speedy trial claims, and the State’s failure to comply with a court order to file a response places This Court in a predicament of not having “findings” to review regarding these speedy trial violations. As This Court has articulated, “[i]f a defendant fails to move to dismiss and instead either pleads guilty or submits to a trial, the issue cannot be brought for the first time on appeal. Koenig, 2018 ND 59, at ¶14, 907 N.W.2d 344; citing 5 Wayne R. LaFave et al., Criminal Procedure § 18.1(d) (4th ed. 2015).

[¶ 39] This issue of a speedy trial and dismissal is not coming before this Court for the first time on appeal. Mr. Wayland attempted time and again to bring this issue up, through counsel, then finally *pro se* the day before trial. In fact, the district court notes this itself twice during the July 29, 2019 hearing. First, “I know you’ve also talked about speedy trial issues.” Tr. 7/29/2019 – 36:14-15. Then at the end of the hearing, during an exchange with the State the district court states, “I think we’re - - I think that[speedy trial] has been basically rule on.” Id. at 56:4-5.

[¶ 40] Contrasting those comments with the April 23, 2019 directive to the State, “I want the State to have something in the file with regard to his request for a speedy trial and take as basically a motion, so that the Court can rule on that motion as far as the speedy

trial.” Tr. 4/23/2019 – 4:21-24. After the April 23, 2019 hearing and beginning at Index # 81, there exists nothing filed by the State regarding the speedy trial issue, and there exists no order by the district court ruling on the “motion” for a speedy trial.

[¶ 41] This is not an issue being raised for the first time on appeal, this is an issue raised over and over again to the district court, wherein the district court simply failed to make findings and failed to rule. Therefore, referring to the Standard of Review in cases involving questions of speedy trial rights, this Court reviews decisions *de novo* and findings under the clearly erroneous standard. Since the district court issued no findings whatsoever, and by simply failing to dismiss the case for a speedy trial violation, this entire appeal shall be reviewed *de novo*, and thereby owing no deference to the district court and viewing this case as if viewing it for the first time.

[¶ 42] **Prejudice To The Accused**

[¶ 43] The prejudice suffered by the accused comes in multiple forms. Most egregiously being the lack of counsel in his defense. Following the March 8, 2019 continuance, Mr. Wayland’s confidence in his counsel diminished to the point of no return, resulting in his second appointed counsel motion to withdraw. A.A. at 31. Then, after receiving no further support from the third appointed counsel, Mr. Wayland was forced to proceed *pro se*. A.A. at 44.

[¶ 44] At the pretrial conference the day before trial, it was discovered that Mr. Wayland’s materials in preparation for trial were all in the possession the court, since Mr. Wayland did not have the ability to make copies, he filed his only copies of everything with the court in support of his motions. Tr. 7/29/2019 – 37:8-10. Mr. Wayland did not have a copy of the jury pool, which the State already had for an unknown amount of time.

Id. at 7:9-11. Mr. Wayland did not have a witness and exhibit list from the State regarding the trial that was commencing in less than 24 hours. Id. at 29:14-16. Mr. Wayland's witnesses were not even subpoenaed less than 24 hours before trial. Id. at 50:7-25.

[¶ 45] It arguably takes an experienced attorney weeks to prepare for a trial. Attorneys with staff, including, but not limited to, resources, copy machines, access to computers, and research materials. Yet Mr. Wayland was given four-days to prepare *pro se* for a trial, from jail, without any resources whatsoever.

[¶ 46] Additional prejudice came in the form of his continued pretrial detention. The pretrial detention goes beyond mere confinement, which, in and of itself is a hinderance that should be an extreme measure and not the default. Nevertheless, the pretrial confinement placed an additional restriction on Mr. Wayland's ability to communicate with anyone in confidence. As is noted in the March 21, 2019 bond review hearing, Mr. Wayland informs the district court that his mail is being opened and read by jail staff. Tr. 3/21/2019 – 11:21-25, 12:1-4.

[¶ 47] Not being able to communicate freely with any outside confinement assets, then being forced to represent oneself in a criminal case sans any attributable resources against the Government, who has unlimited resources, is the fundamental protection the Bill of Rights was focused on protecting for United State's citizens. In this case, that is exactly what the district court and the State effectively accomplished. Mr. Wayland was isolated from any support, any type of reach for support he attempted was supervised by those who were tasked with isolating him. Then in the end, he was forced to take on the power of the government, with all of its resources and assets, without so much as a copy machine.

[¶ 48] CONCLUSION

[¶ 49] Conducting a *de novo* review of the record in this case leaves but one conclusion, that Mr. Wayland's Constitutional Right to a Speedy Trial was violated. Albeit the length was not "presumptively prejudicial," in conjunction with all aspects of the four-factor balancing test, Mr. Wayland's speedy trial right was ignored and violated.

[¶ 50] Mr. Wayland's issues with his attorneys and his lack of participation in the mental health eval had zero impact on his case being able to proceed to trial on March 11, 2019. At the time of the March 11, 2019 trial date, Mr. Wayland had an attorney, the evaluation was over, and report was on file, notice had been provided to all parties well in advance. However, the reason for the delay was purely based on a "priority list" that was established based on the age of the cases, and no other factor. The oldest case that was tried, did not have a speedy trial request on file. The oldest case that was tried was completed on Wednesday March 13, 2019 per the verdict form. Therefore, Mr. Wayland's case could have proceeded on Thursday, March 14, 2019 at the very latest, yet the district court made a unilateral decision to continue Mr. Wayland's case on March 8, 2019. A.A. at 27. Mr. Wayland asserted his right to a speedy trial in writing in compliance with statutory law and did so in court on the record in excess of twenty different times. Finally, Mr. Wayland's prejudice is measured not only in the complete and utter inequity of the trial that was ultimately held, but in forcing a defendant to proceed to trial without counsel due to the district court's actions which, but for the original continuance, the domino effect of the subsequent actions, would not have happened at all.

[¶ 51] This Court need not make any inquiry into the clearly erroneous actions of the district court, as the district court made no findings in this case. Under a completely

original look at this case, this Court can be left with no question that this appellant's speedy trial rights were not only violated, they were completely and utterly ignored. Therefore, Mr. Wayland respectfully requests this Court vacate the criminal judgment against him, Remand to the district court with instructions to dismiss the charges with prejudice due to the violation. In the alternative, vacate the criminal judgment and remand with instructions that the district court make an official ruling on the motion to dismiss for violation of the speedy trial, to include findings.

Respectfully submitted this Thursday, January 23, 2020.

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